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IN THE
Supreme Court of the United States
FOR THE EIGHTH CIRCUIT

No. 75-7041

MONSANTO COMPANY,

Petitioner,

v.

REED BROTHERS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Reed Brothers, Inc. (hereinafter Reed) respectfully opposes the petition for certiorari filed on behalf of Monsanto Company (hereinafter Monsanto), dated November 13, 1975, and served upon this Respondent on November 14, 1975.

Monsanto's petition is in reality an attempt to have this Court review a jury verdict based upon a complicated factual situation. Justice Clark's opinion in the Court of Appeals does not depart from established anti-trust law. Monsanto characterizes that opinion as

one which makes two previously legal manufacturers' policies *per se* violations of Section 1 of the Sherman Act with consequent serious commercial impact. This brief will show that characterization is invalid. The Court of Appeals' decision simply approved a factual determination by the District Court jury that Monsanto and its contract distributors adhered to policies and programs which effected territorial and customer restraints in the sale of Monsanto's farm herbicides. This determination was made upon consideration of a multitude of other evidence, together with the combined effect of Monsanto's shipping policy and rebate program under well-established decisions of this and other courts.

OPINIONS BELOW

Respondent will refer to opinions below herein by Appendix designation used in Monsanto's petition for certiorari.[1]

JURISDICTION

Respondent agrees with Petitioner's statement of jurisdiction.

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[1] Similarly, references to trial transcript pages will be preceded by "TR."

QUESTIONS PRESENTED

A review of the opinion by Justice Clark supporting the Court of Appeals' decision readily shows that the assignment of questions that Monsanto claims are presented for review by this Court should the petition for certiorari be granted is in error. Again Monsanto attempts to split its two announced programs and characterizes the Court of Appeals' decision as holding that these programs are in and of themselves *per se* violations of Section 1 of the Sherman Act by application of this Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Clearly, the Court of Appeals' decision is not based upon a separation of these two policies and a simple determination that they were each *per se* illegal. Justice Clark precisely stated the holding of the Court of Appeals by emphasizing "[W]e hold only that a judgment n.o.v. was improperly granted where, as in this case, the jury could have found that Monsanto made rebate policies and enforced its area of primary responsibility contracts through shipping policies which had the effect of restricting its distributors in the resale of its products." (Pet. for Cert. App. A, p. 22). Thus, the question presented for possible review by this Court is whether the Ccurt of Appeals was correct in determining there were sufficient facts to support the jury's finding that Monsanto's rebate and shipping policies, when taken together with substantial evidence of other Monsanto predatory acts, had the restrictive *effect* prohibited in *Schwinn*.

STATEMENT OF THE CASE

Petitioner's statement of the relationship between Monsanto and Reed up to the time of Reed's termination as a contract distributor of Monsanto farm herbicides is correct. However, it would be more correct to say that Reed bought *some* Monsanto herbicides from contract distributors after its termination but was foreclosed from making substantial purchases due to the combined effect of Monsanto's rebate and shipping policies after the 1971 crop year together with Monsanto's retaliatory acts or threats thereof against contract distributors who sold or desired to sell to Reed and those similarly situated.

Reed did introduce evidence of separate claims for damages as a result of predatory practices by Monsanto at the time of trial. However, the jury determined there was insufficient evidence to support Reed's claim for damages resulting from its termination as a contract distributor and the Court of Appeals agreed. On the other hand, both parties and the Court of Appeals agreed that the jury did award a verdict to Reed based upon the evidence Reed introduced with regard to damages sustained by it after the 1971 crop year as a result of being a victim of post-termination policies and practices followed by Monsanto and its remaining contract distributors which had the effect of limiting where and to whom the distributors could sell Monsanto herbicides. (Pet. for Cert., App. A, p. 12). This award was approved by the Court of Appeals.

A. Monsanto's Post-Termination Policies.

Monsanto's petition would lead this Court to believe that Reed and the Court of Appeals simply read the shipping policy and rebate program enunciated by Monsanto in its marketing directives to contract distributors and concluded each was a *per se* violation without consideration of anything more. Not only is this an inaccurate statement of the case below but the characterization of these programs by Monsanto in its petition does not portray their true predatory nature.

Monsanto's shipping policy not only did not allow distributors to receive shipments anywhere but within their primary area of responsibility but would not allow shipments directly from Monsanto or its warehouses to customers outside the distributor's primary area of responsibility. (TR. 858). This policy, which Monsanto says is needed to maintain "the critical geographical balance," had such absurd results as making a distributor order shipment of Monsanto herbicides to Illinois even though the customer and the Monsanto warehouse where the shipment originated were both located in Iowa so that a sale could be consummated. (TR. 424). It was evidence such as this, together with other evidence Justice Clark reviewed in his opinion (Pet. for Cert., App. A, pp. 5-8; pp. 19-22), which gave sound basis for the jury's conclusion that the policy was one of the methods Monsanto used to effect restraints violative of *Schwinn* pronouncements.

Monsanto's rebate program, instituted in the 1972 crop year, combined with the already established shipping policy to additionally restrict distributor sales and Reed was, as Justice Clark put it, "[C]aught in the crossfire of these two policies." (Pet. for Cert., App. A,

p. 6). The main thrust of the rebate policy was a return of a portion of the purchase price to distributors *only* if sales were made to a certain class of customers Monsanto defined as retailers. This resulted in higher prices and a consequent inability to purchase for Reed and others similarly situated. The alleged "reasons" for the rebate had no relationship to the enforced class of customer restraint. The alleged justification for these policies, even though admitted into evidence over the objection of Reed, (TR. 698) was rejected by the jury and Court of Appeals. (Pet. for Cert., App. A, p. 21, n. 6).

B. Effect and Jury Instructions.

The economic impact of these combined policies, together with Monsanto methods of enforcement upon Reed was, as Justice Clark put it, "dramatic." (Pet. for Cert., App. A, p. 8). The fact that Reed was able to continue as a wholesaler and that strict territorial and customer exclusivity was not created does not erase the jury's factual determination of an illegal restraining effect under proper instructions. Although Monsanto attempts to establish that this case should have been submitted under a "rule of reason" instruction, Monsanto agreed at the time its counsel was making a record in the District Court that the instructions submitting the case to the jury under rule of reason "shouldn't be in at all." (TR. p. 889). Justice Clark made it clear that a rule of reason instruction would have been improper, even though the District Court suggested it wanted guidance on how to so instruct if the case was sent back for a new trial, by stating,

"[W]hatever their appellation or garb, policies which have the effect of being unlawful territorial and customer restraints are *per se* violations of the Sherman Act . . ." (Pet. for Cert., App. A, p. 24).

THE COURT OF APPEALS DECISION

The Court of Appeals' decision speaks for itself. However, it should be noted that Monsanto in its Petition ignores numerous factors other than the rebate and shipping policies which were reviewed by Justice Clark as a basis for the jury's decision. These include the *fact* of a primary area of responsibility clause in the distributor contracts, retaliatory acts and threats by Monsanto and a policing of the rebate program through intimidating information gathering. As stated above, both the Respondent and the Court of Appeals *did* dispute Monsanto's supposed business reasons for the restraining practices by objecting to their introduction into evidence and consideration on appeal. The jury apparently also rejected them.

REASONS FOR DENYING THE WRIT

Respondent will show that there is no conflict between the Court of Appeals' decision and the "location clause" and "economic disincentive" cases as Monsanto attempts to assert in its Petition. This approach is used only to rebut the petition point-by-point and is not an agreement by Reed that the consideration of the Writ should be made on a basis of splitting the shipping and rebate policies and determin-

ing their legality individually without more. Contrary to its assertions, Monsanto is attempting to have this Court review a case which was decided on a factual basis after a lengthy trial. The fundamental nature of the case is well-established law which was incorporated in the jury instructions. The decision of the Court of Appeals clearly recognized this when it was forced to review the record and law painstakingly after the improper rulings by the District Court on the post-trial motions.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE "LOCATION CLAUSE" CASES.

Monsanto urges in Division I of its petition that the Court of Appeals' opinion conflicts with decisions of the United States Supreme Court and other circuits regarding "retailer 'location clause' agreements." This is simply not so. The cases that Monsanto cites to show the supposed conflict are clearly distinguishable on the facts and the law.

Four of the cases cited by Monsanto in Division I involve location clauses used in automobile dealer franchise agreements.[2] These cases stand for the

[2]One of the cases cited, *Woodard v. General Motors Corporation*, 298 F.2d 121 (5th Cir. 1962) did not even involve Sherman Act allegations; the only statutory claim arose under the Automobile Dealers Franchise Act, 15 U.S.C. §1221, 1222. The other three cases were decided at various procedural stages on the basis that there was no showing of illegal effects of the use of location clauses. These cases were *Salco Corp. v. General Motors Corp., Buick Mot. Div.*, 517 F.2d 567 (10th Cir. 1975); *Kaiser v. General Motors Corp.*, 1975-1 Trade Cas. ¶60,354 (E.D. Pa. 1975); *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), reh. denied, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).

proposition that the inclusion of location clauses in such agreements is not unlawful in and of itself. However, the facts of those cases show that the distribution system in the automobile industry is different from the distribution system in the farm chemical industry. The only similarity in the two systems is the analogy that can be drawn between the automobile franchise agreement location clauses and the designation of areas of primary responsibility in the Monsanto distributor contracts. Reed has never argued that the designation of areas of primary responsibility in and of itself is unlawful and the Court of Appeals recognized this point. (Pet. for Cert., App. A, p. 22). Thus, to whatever extent that the location clause cases are relevant, the Court of Appeals' opinion is in complete harmony with them.

Moreover, where Monsanto cites cases other than automobile dealer cases in Division I, it fails to note the critical point of those cases. That point is that even though the designation of areas of primary responsibility is acceptable, where other facts show a misuse of the area of primary responsibility clause by enforcing limitations on how distributors may sell outside the areas, then there arises a question of fact as to whether illegal restraints exist.

Monsanto cites *Superior Bedding Co. v. Serta Associates, Inc.*, 353 F. Supp. 1143 (N.D. Ill. 1972) and provides a quotation from the case, but has conveniently omitted a crucial part of the quotation. That part is the following:

> "Territorialization in and of itself is not violative of the federal anti-trust laws. The federal anti-trust violation occurs when territorialization is combined with territorial sales restrictions." (353 F. Supp. at 1147-1148).

Monsanto cites the District Court decision in *Schwinn* on remand, *United States v. Arnold, Schwinn & Co.*, 291 F. Supp. 564 (N.D. Ill. 1968), which did specifically allow for the designation of areas of primary responsibility. But again Monsanto conveniently ignores that portion of the Final Judgment which states as follows:

> "Defendant Schwinn and the Association are each jointly and severally enjoined and restrained from, directly or indirectly, imposing, inducing, or securing any condition or any agreement or understanding that limits the freedom of any distributor or retailer of Schwinn products as to where and to whom it may resell such products, by oral or written statements or by acts of retaliation." (291 F. Supp. at 565).

Thus, *Schwinn* on remand stands for the proposition that the designation of areas of primary responsibility alone is acceptable, but that a further limitation on territories in which products may be sold continues to be a violation of the antitrust laws.

Perhaps most significantly, Monsanto relies on the District Court's Final Judgment in *U.S. v. Topco Assoc., Inc.*, 1973-1 CCH Trade Cas., ¶74,485 (N.D. Ill.), *aff'd mem.*, 414 U.S. 801 (1973), in support of its shipping policy. This case is significant because it most clearly points out the proposition that although the designation of shipping points without more is acceptable, where there are other facts that show such designations have the effect of restricting territories they may be illegal. It was apparent that the District Court did not want to be misunderstood on this point. The initial Final Judgment in *Topco* in paragraph V stated only that Topco could determine "warehouse locations to which it will ship products." (1973-1 Trade

Cases at 94, 154). Upon reconsideration, however, the Final Judgment was amended by the District Court to state that Topco could determine "warehouse locations to which it will ship products, provided that such determination shall be based solely on sound business considerations *and will not achieve effects prohibited by Paragraph IV hereof. . . .*". (1973-1 Trade Cas. at 94, 156; emphasis added.) Paragraph IV of the Final Judgment prohibited Topco from maintaining or enforcing any agreement in which it limited or restricted the territories within which member firms of Topco could sell products procured from or through Topco. This again points out the validity of Reed's position that where there are facts showing restraints, there arises a factual determination to be made as to whether the effect of such restraints causes a violation of the antitrust laws.

A recent decision in the Tenth Circuit, *World of Sleep, Inc. v. The Stearns and Foster Co.*, 1975-2 Trade Cas. ¶60,564 (10th Cir. 1975) approved a jury instruction on territorial restrictions which is comparable to the instruction given below. It was clear in *World of Sleep, Inc.* that the question of whether a territorial limitation existed was for the jury.

The evidence below showed that prohibited effects were present. Justice Clark's opinion refers to the testimony of several witnesses regarding the method in which Monsanto combined its area of primary responsibility designations and shipping policy together with other methods of coercion to restrict territories. (Pet. for Cert., App. A, pp. 6-8). This evidence clearly raised a factual question for the jury as to whether the effect of such policies was to create an illegal territorial restraint. The jury found such an effect. The question of that effect was precisely what was left open for fact

finders in the *Schwinn, Topco* and *Superior Bedding* decisions. As Justice Clark succinctly stated in his opinion:

> "It is true, as Monsanto points out, that the courts have approved a manufacturer's designation of areas of primary responsibility for its distributors without more, but here we have so much 'more'. There was credible evidence which the jury could have relied upon in determining that Monsanto's additional policies effectively curtailed the ability of its distributors to sell Monsanto herbicides after purchase to whomever they wished. It is those policies and the agreements between Monsanto and its distributors that the law condemns, not the designation of primary areas." (Pet. for Cert., App. A, p. 22).

Monsanto would lead this Court to believe that the issues presented were purely legal. This is not so. Reed could not have prevailed by setting out only the area of primary responsibility clause of the contract and the shipping policy. It was necessary for Reed to show the effect of the manner in which Monsanto used those policies and Reed did so. There is no new law here – simply a factual determination under legal principles that are not open to challenge.

Monsanto further states in its petition that "rarely has a more appropriate circumstance been presented for exercise of this Court's discretionary jurisdiction." The conflict Monsanto attempts to create has to do solely with automobile dealer franchise agreements. These are not at all similar to the distribution system Monsanto has. It can be seen from the facts that this case is patently inappropriate for the kind of determination Monsanto seeks.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE SO-CALLED ECONOMIC DISINCENTIVE CASES.

The issue in this case is whether Monsanto's practices had the *effect* of limiting the freedom of contract distributors to choose to sell to Reed. *Schwinn* and *Topco* show clearly that if such an effect is present, it is *per se* a violation of the Sherman Act. The question of whether Monsanto's rebate system, in conjunction with Monsanto's other acts, had the effect prohibited by *Schwinn* and *Topco* is a question of fact to be determined by the jury. Here the Trial Court's Instruction No. 10 described in general terms what constitutes an unlawful post-sale customer restriction, and the jury decided that Monsanto's conduct had the prohibited effect that would render its conduct unlawful. This is the proper method of instructing the jury where there is a factual dispute over whether the defendant's conduct has an effect that has been categorized as unlawful *per se*. See *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966). There the Court described in general terms what constitutes a "group boycott" and allowed the jury to determine whether an eligibility rule implemented by an association of bowling centers in fact constituted a "group boycott" and was therefore unlawful *per se*. 356 F.2d 377.

Whenever a supplier is charged with using a rebate system that achieves an illegal effect, it must be left up to the finder of fact to determine whether the rebate has the claimed unlawful effect. In the present case, Monsanto distributors received rebates only in connection with products they resold to retailers. Surely if Monsanto had given a rebate of 75% or 90% of its selling price, such a rebate would have had the effect of channeling products from distributors to retailers and

cutting out wholesalers like Reed. The question of whether, in a particular factual context, a particular rebate will cause distributors to modify their conduct in order to receive the rebate is a factual question. Monsanto admits in its petition it intended that the rebates would cause distributors to (1) report information on sales to retailers and (2) to sell the product to retailers early in the crop year. In order to get the rebate, distributors also had to sell the product to retailers rather than to wholesalers like the plaintiff. It follows that the rebate would cause distributors to fulfill this condition as well, and the jury found this to be true.

Monsanto makes much of its claimed business justifications for the rebate system. In fact, Monsanto has admitted that the purpose of the rebate system was to create and sustain channels of distribution flowing from Monsanto distributors to retailers, and then to farmers, thus cutting out wholesalers such as Reed. (Tr. pp. 395-396; pp. 258-259).

Assuming that information-gathering and early sales to retailers were Monsanto's actual reasons for implementing the rebate, these are merely marketing motives and cannot excuse a practice having the effect of limiting the freedom of Monsanto distributors to resell Monsanto products wherever and to whomever they wish. *Schwinn, supra*, 388 U.S. 365, 374-375; *Topco, supra*, 504 U.S. 596, 607; *U.S. v. Glaxo Group Limited*, 302 F.Supp. 1, 8-11 (D.C. 1969), *reversed in part on other grounds*, 410 U.S. 52, (1973); *Copper Liquor, Inc. v. Adolph Coors Company*, 506 F.2d 934, 944-947 (5th Cir. 1975); *Todhunter-Mitchell & Co., LTD v. Anheuser-Busch, Inc.*, 375 F.Supp. 610, 623-624 (E.D. Pa. 1974). If the effect of Monsanto's practices was to unlawfully restrain trade, it matters not whether Monsanto intended this effect. *Times-Picayune Publicity Co. v. United States*, 345 U.S. 594, 614 (1952); *United*

States v. Masonite Corp., 316 U.S. 265, 275 (1941); *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138, 1145 (8th Cir. 1960).

Monsanto is neither a newcomer to the industry nor a failing business, the two situations noted in *Schwinn, supra*, 388 U.S. at 374, as possible exceptions to the rule that vertical customer and territorial restrictions are *per se* unlawful. To the contrary, Monsanto is a corporate giant that increased its soybean herbicide national market share from 3.3% at the end of 1968 to 22% at the time of trial, and increased its corn herbicide national market share from 15% at the end of 1968 to 30% at the time of trial. (TR. pp. 759-761). Monsanto made no attempt to introduce evidence that similar shipping restrictions or rebate systems were used by its competitors and were necessary for survival in the industry. Reed was not allowed to present evidence that Monsanto's challenged practices were unique in the industry. (TR. pp. 94-98).

An exception to the rule that vertical customer restrictions are *per se* unlawful was recognized by the Court in *Tripoli Company v. Wella Corporation*, 425 F.2d 932, 936-938 (3rd Cir. 1970), *cert. denied*, 400 U.S. 831 (1970), in those situations where it is necessary, for safety reasons, that resale of a product dangerous to humans be restricted to purchasers who are licensed professionals. Even if the dangerous product exception is valid, the facts of the instant case do not lay it within the exception. Monsanto's alleged justifications are only marketing and competitive considerations, and therefore are governed by the rule fashioned in *Schwinn*. In *Schwinn, supra*, 388 U.S. at 375, this Court stated:

> "The antitrust outcome does not turn merely on the presence of sound business reason or motive

> . . . Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."

In Division II of its Petition, Monsanto claims that the decision below is in conflict with a number of decisions in other circuits regarding pass-over payments and other economic disincentives. A cursory reading of the cases cited by Monsanto in its petition reveals that those cases do not deal with issues comparable to the issues present in this case. Monsanto's flagship case is *Checker Motor Corp. v. Chrysler Motor Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969), *aff'g*, 283 F.Supp. 867 (S.D.N.Y. 1968). The case was before the Court of Appeals on appeal from the District Court's denial of Plaintiff's Motion for Summary Judgment under FED. R. CIV. P. 56(a), and the trial court's opinion included findings of fact as well as conclusions of law. 283 F.Supp. at 881. The record shows that Chrysler taxicab dealers could choose to keep their prices the same, make the profit on each sale, and increase their volume because of a lower net cost to taxicab purchasers; or, the dealers could choose to raise their price, increase their profit per sale, and take the chance of failing to increase their volume. There was absolutely no evidence offered to show that the rebate caused Chrysler taxicab dealers to sell at an inflexible price. 405 F.2d at 322.

Again Monsanto cites *Superior Bedding Company v. Serta Assoc., Inc.*, 353 F.Supp. 1143 (N.D.Ill. 1972) incorrectly and incompletely in its petition. The case involved a non-jury trial and the opinion includes both

findings of fact and conclusions of law. There is no holding that pass-over fees are always lawful, as Monsanto infers. The case holds simply that such fees are prohibited only if it is shown they have an unlawful, anticompetitive effect. 353 F.Supp. at 1150.

Sun Oil Company v. Vickers Refining Company, 414 F.2d 383 (8th Cir. 1969), *aff'g*, 285 F.Supp. 403 (W.D.Miss. 1968), was another case which was tried to a judge and the trial court's opinion included both findings of fact and conclusions of law. 285 F.Supp. at 407. The Court of Appeals merely reviewed the trial court's finding of fact that the ambiguous contract terms involved, when examined in the context of all the circumstances of the agreement, did not have the unlawful effect of fixing prices. 414 F.2d at 389-390.

Sun Oil Co. v. FTC, 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds*, 371 U.S. 505 (1963), is a case in which the FTC alleged the defendant was guilty of price fixing. The case against the defendant failed because the dealer involved testified that he did not agree to and was not forced to resell gas at any certain price in order to get the defendant's discount. 294 F.2d at 483. Thus, there was no agreement and defendant's discount produced no unlawful effect as a factual matter.

Susser v. Carvel Corporation, 332 F.2d 505 (2d Cir. 1964), is yet another non-jury case cited by Monsanto in its petition. *Susser* involved no payment from the supplier to its purchaser, and the District Court found as a matter of fact that the defendant suggested retail prices to its purchasers but that its actions did not have the unlawful effect of imposing a price-fixing scheme. The Court of Appeals stated that it was not its job "...to consider *de novo* the conflicting evidence and

resolve this factual issue . . ." 332 F.2d at 509-510. Likewise, it is not this Court's job to review the evidence in the present case and determine whether Monsanto's rebate system had the unlawful effect that the jury found.

In *Butera v. Sun Oil Company, Inc.*, 496 F.2d 434 (1st Cir. 1974), the defendant suggested a retail price but did nothing and threatened nothing that was contingent on adherence to that suggested price. 496 F.2d at 437. In *Butera*, all the defendant did was adjust its wholesale price in accordance with the rise and fall of the market for its product, and the Court held that this clearly produced no unlawful effect.

In *Anderson v. American Automobile Association*, 454 F.2d 1240 (9th Cir. 1972), the Court held that the American Automobile Association's assignment to its contract stations of territories in which they performed the towing service promised by AAA to its members does not have an unlawful anticompetitive effect, because once the AAA member enters into its contract with AAA, the member is effectively removed from the automobile towing service market. In other words, AAA sells the service to the motorist and merely contracts with a station to provide the service it has already sold. 454 F.2d at 1244-1245. The plaintiff had never applied for an appointment as an AAA contract station.

In *Jonel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968), the Court did not hold, as Monsanto states, that a customer limitation contract clause is not a *per se* violation. The Court held that there was conflicting evidence on whether the clause was firmly and resolutely enforced, and that consequently this question was for the jury. 396 F.2d at 406-407.

Kestenbaum v. Falstaff Brewing Corporation, 514 F.2d 690 (5th Cir. 1975), is not even remotely similar to the case below. That case involved only a limited privilege accorded to a franchisor to require that the sale price of a franchise be reasonable in order to insure that the new franchisee, with whom the franchisor would be dealing in the future, would start off financially sound. The plaintiff's price-fixing claim in that case failed because he did not prove two elements necessary to a successful antitrust claim. The plaintiff failed to prove an injury to his business resulting from the defendant's asserted price-fixing actions and he failed to offer any competent evidence on the amount of damage. 514 F.2d at 694-695. Furthermore, the plaintiff admitted he would have priced at the same competitive prices in absence of coercion by the defendant. 514 F.2d at 694.

Monsanto cites *Butera v. Sun Oil Co.*, 496 F.2d 434 (1st Cir. 1974), as another which allows a seller to "influence" customers' selling decisions but, in reality, turned on a motion for summary judgment and thus does not have the factual determination of a restraining effect found in this case. Thus, as the other cases cited by Monsanto, it is not on point.[3] However, the court in *Butera* does cite with approval *Lehrman v. Gulf Oil Corporation*, 464 F.2d 26 (5th Cir. 1972), a case whose

[3]The cases cited by Monsanto which probably has least relevance to this case is *Carter V. Wallace, Inc. v. United States*, 449 F.2d 1374 (Ct. Cl. 1971). That was a suit charging unauthorized use of a patent and is not an antitrust suit. The United States interposed an antitrust defense based upon a FTC approved license agreement which has no legal or factual application to this case.

facts are similar to those in this case. In that case a supplier made receipt of a discount by its customer contingent upon the customer reselling the produce at the supplier's suggested resale price. In holding that the discount arrangement was a *per se* violation because its effect was to enforce the suggested resale price, the Court states that, "... adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's ..." discounts. 464 F.2d at 39. Likewise, in the case below, the jury found that reselling Monsanto products to retailers rather than wholesalers was the *quid pro quo* for receiving Monsanto's rebate.

CONCLUSION

The rule of law governing this case was laid down by this Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378 (1967), where it stated:

> "We agree, and upon remand, the decree should be revised to enjoin any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose."

This Court again endorsed the rule in *United States v. Topco Associates, Inc.*, 405 U.S. 596, (1974), *final judgment entered on remand*, 1973-1 Trade Cases ¶74,391 (N.D.Ill. 1973), *final judgment modified*, 1973-1 Trade Cases ¶74,485 (N.D.Ill. 1973), *aff'd per mem.*, 414 U.S. 801 (1973) where this Court held that supplier's customers must have an "unfettered choice" of where and to whom they will resell the supplier's products. This rule of law was embodied in the District Court's instructions to the jury which made its factual

determination after the receipt of a multitude of evidence. The validity of the factual determinations and the instructions under which they were made were carefully reviewed and approved in a unanimous decision by the Court of Appeals. Monsanto's assertion that a further review of this case by this Court would involve examining fundamental departures from prior decisions with a lack of factual dispute is totally without merit.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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